Supreme Court, U.S.
FILED
MAR 9 1999
CLERK

No. 98-1154

In the Supreme Court of the United States

OCTOBER TERM, 1998

ABF FREIGHT SYSTEM, INC.,
Petitioner

v.

RICK WEBB

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

PETER BUSCEMI
Counsel of Record
THOMAS K. WOTRING
JOSEPH E. SANTUCCI, JR.
MITCHELL J. MATORIN
MORGAN, LEWIS & BOCKIUS LLP
1800 M Street, N.W.
Washington, DC 20036
(202) 467-7190
Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
1. The first question presented by ABF's petition was properly preserved in the courts below	2
2. Respondent's attempt now to allege collusion between ABF and the Union is both improper and unsupported	3
3. Respondent's repeated references to "fabricated physical evidence" have nothing to do with the questions presented for review	6
4. Respondent's characterization of ABF as the "primary wrongdoer" begs the question to be decided	6
5. None of respondent's efforts to defend the district court's instructions to the jury can avoid the need for review in this case	8
CONCLUSION	10

TABLE OF AUTHORITIES

CASES

Bowen v. United States Postal Service, 459 U.S. 212 (1993)	7, 8
Camacho v. Ritz-Carlton Water Tower, 786 F.2d 242 (7th Cir.), *cert. denied*, 477 U.S. 908 (1986)	7-8
Vaca v. Sipes, 386 U.S. 171 (1967)	7

In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-1154

ABF FREIGHT SYSTEM, INC.,
Petitioner

v.

RICK WEBB

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

REPLY BRIEF FOR PETITIONER

As the petition in this case explained, ABF Freight System, Inc. ("ABF") seeks review in this Court because the apportionment of damages in the courts below departs from the standards established in previous decisions of this Court and conflicts with the approach followed by other federal courts of appeals. Respondent barely acknowledges the authorities cited in the petition, dismissing them all with the categorical and unsupported assertion that they are "evidence-specific and fact-limited." (Br. in Opp. 25.) Instead of addressing the legal issues for which review is sought, respondent presents a peculiar amalgam of procedural, factual, and policy arguments that allegedly militate against review. All of these diversionary tactics fail.

1. The first question presented by ABF's petition was properly preserved in the courts below. Respondent first argues (Br. in Opp. 5-7, 15-16) that review should be denied because ABF seeks a rule of law that it did not request in the district court. In particular, according to respondent, ABF did not ask the trial court to rule that damages should be apportioned between the employer and Teamsters Local 17 ("the Union" or "Local 17") based on the date of the grievance committee's decision that sustained respondent's discharge. That is not correct. ABF requested that ruling, in writing, on at least two occasions—first, in its November 1994 motion for summary judgment (ABF App. 52) ("*ABF's back pay liability ends no later than August 10, 1993, the date of the JWAC hearing which upheld Webb's discharge*"), and, second, in its August 1996 motion for judgment as a matter of law or for a new trial (ABF App. 145) ("damages that accrued after the August 10, 1993 JWAC proceeding must be charged, as a matter of law, to the union, and not to ABF").[1] The court of appeals explicitly acknowledged and addressed ABF's argument on this point, as respondent himself admits. (Br. in Opp. 14.) *See, e.g.*, Pet. App. 10a-11a ("ABF argues that Webb was not entitled to an award of back pay from ABF for the period after the grievance arbitration hearings"), 26a ("ABF argues that its damages should have been capped as a matter of law to those wages that Webb lost prior to the grievance proceedings and that the district court erred in giving the jury its proportionate fault instruction"). Respondent never contended before the court of appeals that the point had not been adequately preserved in the district court. There is no basis, therefore, for respondent's assertion that ABF did not ask the trial court for

[1] "ABF App." refers to the Appendix to ABF's brief in the court of appeals.

the legal ruling that ABF now seeks in this Court through the first question presented in the petition.[2]

2. Respondent's attempt now to allege collusion between ABF and the Union is both improper and unsupported. In the petition, ABF recognized that, where an employer and a union collude with each other in breaching a collective bargaining agreement and denying an employee the effective processing of a grievance, several courts have not apportioned damages at all, but instead have held the union and employer jointly and severally liable. (Pet. 22 n.8.) Prompted by that acknowledgment, respondent now attempts to assert that this is a case involving collusion between ABF and the Union. The argument is flawed in several ways.

First, respondent pursued no such legal theory in the courts below. Respondent never sought joint and several liability against ABF and the Union. To the contrary,

---

[2] Respondent is correct that ABF did not request—after the district court already had rejected the position set forth in ABF's summary judgment motion—a separate jury instruction requiring the jury to cut off damages as of the date of the grievance proceeding. The district court already had refused such a ruling, and there would have been no point in requesting an instruction contrary to the district court's decision on the summary judgment motion. Mistakenly, the petition overlooked the district court's summary judgment ruling and stated that ABF asked for such an instruction. Pet. 5. We regret the error. As the court of appeals' decision demonstrates, however, there is no question that the legal point was preserved in the district court.

Respondent's repeated references to an allegedly "lost or withdrawn" instruction No. 7 (Br. in Opp. 5, 8, 13) are misguided. There is no such separate instruction; the instruction referred to as No. 7 was the same instruction that is set forth in the appendix to the petition and referred to as Instruction No. 36. Pet. App. 37a. The numbering of the various proposed instructions changed as the district court considered the parties' proposals and put together the actual set of instructions to be given to the jury.

respondent endorsed (and continues to endorse) the district court's instruction regarding apportionment of liability between ABF and the Union. Implicit in that position is a recognition that joint and several liability is not appropriate in this case. That recognition is supported by respondent's own recitation of all of the Union's many failings in pursuing respondent's grievance. (Br. in Opp. 12, 17). Having failed to seek joint and several liability in the courts below, respondent is precluded from raising such a claim for the first time here.

Moreover, although respondent now claims that there was evidence of collusion regarding "all aspects of the grievance process" in this case (Br. in Opp. 17), respondent fails to identify any such evidence. That is hardly surprising, since there was none. The only item that respondent mentions from the record is an isolated statement by the trial judge near the close of respondent's evidence. The excerpt from the trial court's remarks reproduced by respondent (Br. in Opp. 4) is incomplete and taken out of context, and it in no way supports respondent's hastily constructed assertion of collusion between ABF and the Union.

The trial court's statement did not concern joint and several liability but rather whether the court would permit the jury to consider whether ABF acted "outrageously" so that respondent could claim special damages for emotional distress based on alleged extreme misconduct. It was in that context that the court made the following statement:

> If, indeed, the plaintiff's evidence is to be believed—if the jury believes it—that evidence was fabricated in this case; that there was some sort of agreements and plans between the union and employer—there has been some showing of that with the weekend

> work; that there was a statement afterwards that he would never work at another trucking company, all of those are sufficient for a showing of exceptional circumstances which would give rise to these special damages, extreme and outrageous misconduct.
>
> If this were a discharge case and there were a claim for outrageous, I would allow that to go to the jury with this evidence under state law, if this were a diversity case.
>
> So the evidence may come in; and the jury, not the Court, will decide whether this is the type of a case where—where the employer was acting outrageously. That's a factual issue. All I'm ruling is that there is enough evidence to go to the jury. I understand it's going to be rebutted, we're going to hear other evidence; but the jury is the fact-finder here, so the evidence may come in on emotional damages—I hope very briefly, Mr. Olsen.

Tr. 614 (July 11, 1996). Respondent did not claim, and neither the district court nor the jury found, collusion between ABF and the Union in connection with Webb's discharge and the Union's handling of his grievance. Indeed, as the court of appeals observed, the jury rejected even Webb's claim of "extreme" misconduct by ABF and declined therefore to award any damages on Webb's claim of emotional distress. Pet. App. 9a.[3]

---

[3] As a review of the district court's statement shows, the only alleged "evidence of collusion" offered by respondent concerned the resolution of a grievance over the allocation of weekend work assignments, not respondent's discharge. Pet. App. 3a. Although the jury rejected this evidence as the basis for any claim of special damages, the evidence undoubtedly suggested to the jury a possible political motive for Local 17's bad-faith handling of respondent's discharge grievance.

3. Respondent's repeated references to "fabricated physical evidence" have nothing to do with the questions presented for review. In still another diversionary tactic, respondent repeatedly accuses ABF of submitting fabricated evidence in the grievance proceeding. Apart from the fact that such accusations are untrue, they are irrelevant to the questions presented for review. The issue in this case is the legal standard governing the apportionment of liability between an employer and a union in a "hybrid" Section 301/duty of fair representation case. In such a case, the employer's alleged wrongdoing is an unlawful discharge or other disciplinary action allegedly in violation of the governing collective bargaining agreement. The basis for the claim against the employer is the employer's job-related action against the employee, not the employer's conduct in defending against a subsequent grievance. Obviously, to the extent that an employee believes that evidence presented in a grievance proceeding has been fabricated, the employee and the employee's bargaining representative can and should bring his views to the attention of the grievance committee or the arbitrators, and the issue can be addressed at that time.[4] Such an assertion does not, however, affect the appropriate resolution of the legal issues presented in the petition.

4. Respondents characterization of ABF as the "primary wrongdoer" begs the question to be decided. It is a necessary part of respondent's case that, if the Union had not breached its duty to represent him fairly, he would have been reinstated as a result of the grievance proceed-

---

[4] Indeed, it was Local 17's failure adequately to present respondent's view of the evidence—possibly for reasons relating to an internal Union political dispute—that led in part to respondent's claim of a breach of the duty of fair representation. *See* Pet. App. 6a, 15a-18a.

ing, and almost all of the damages awarded by the jury never would have been incurred.[5] As a result of the Union's breach of its duty, the grievance proceeding malfunctioned, and ABF now has been assessed back pay damages some 70 times greater than the total damages that would have been incurred in the absence of the Union's breach.

Nonetheless, respondent seeks to avoid review by characterizing ABF as the "primary wrongdoer." Respondent does not define this term. His contention appears to turn exclusively on the chronological truism that an employer's termination of an employee precedes a union's breach of its duty to fairly represent the employee in the ensuing grievance process. But if this truism is the controlling factor in determining the apportionment of damages, then this Court's decisions in *Vaca* and *Bowen* are meaningless. *See Vaca v. Sipes,* 386 U.S. 171 (1967); *Bowen v. United States Postal Service,* 459 U.S. 212 (1983). Under respondent's theory, the employer always would be primarily responsible for back pay damages, and case-by-case allocation would not be necessary. Both *Vaca* and *Bowen,* however, require the allocation of back-pay damages between the union and the employer "according to the damage caused by the fault of each." *Vaca,* 386 U.S. at 197. The rule proposed by ABF would ensure that this mandate is fulfilled. *See, e.g., Camacho v.*

---

[5] As explained in the petition (Pet. 18), if the Union had represented respondent fairly and respondent still was not reinstated through the grievance procedure, that outcome would have been final, and respondent would not have been permitted to pursue any claim against ABF in court. Respondent cannot be better off in his claim against ABF if the Union breached its duty of fair representation than if no such breach had occurred. Accordingly, unless respondent could demonstrate that he would have been reinstated in the absence of the Union's breach, he would have had no claim against ABF.

Ritz-Carlton Water Tower, 786 F.2d 242, 245 (7th Cir.) ("The employer is liable for any damages preceding the time an arbitrator would have reinstated the employee, had the union done its duty."), *cert. denied*, 477 U.S. 908 (1986). Respondent's position, on the other hand, ensures that unions can freely breach their duty of fair representation, in the knowledge that the employer will be forced to pay most, if not all, of the damages attributable to that breach. Such a result would seriously undermine the entire grievance process and the ability of collective bargaining parties to rely on private means of resolving their disputes. *See, e.g., Bowen*, 459 U.S. at 227 (describing grievance procedure as "a procedure that contemplates that both employer and union will perform their respective obligations").

5. None of respondent's efforts to defend the district court's instructions to the jury can avoid the need for review in this case. In a further effort to defeat review, respondent makes a series of arguments concerning the district court's instructions, all of which fail to address the legal issue raised by ABF. Respondent argues:

(i) that the district court's instruction on the apportionment of damages was broad enough to permit the jury to consider, as one relevant factor, the date of the hearing before the grievance committee in San Diego;

(ii) that the instruction requested by ABF would have improperly highlighted only one item of evidence at the trial; and

(iii) that the district court's instruction on apportionment somehow "embodied the very concept" that ABF sought to convey in the instruction that the district court rejected.

All of these arguments miss the point. Unless the district court either limited ABF's potential damages as a matter

of law to the amount of back pay owed at the completion of the grievance proceeding or at least instructed the jury that it should consider that date as a significant factor in the apportionment decision, the apportionment would be performed, as it was in this case, without any standards at all and without any recognition of the enormous disparity between the amount of damages that would have been incurred had the Union performed its duty and the amount that actually was incurred as a consequence of the Union's failure to do so.

Nothing in the instruction actually given by the district court provided the jury with any guidance on this point or "embodied the concept" underlying ABF's position. Respondent's suggestion that the date of the grievance proceeding is just one factor that the jury can consider, similar in this regard to the thickness of the branch that Webb hit with his truck, assumes that the jury should apportion damages by making an ad hoc judgment about how "bad" the conduct of the employer and the Union was, according to some abstract standard not explained by the court and left to the jury to devise in each case on whatever basis it sees fit. That is not the sort of apportionment that is contemplated by this Court's decisions and the decisions of other circuits cited in the petition. In short, nothing in the brief in opposition obviates the need for intervention by this Court to establish the appropriate guidelines for dividing liability between the Union and the employer in hybrid Section 301/DFR actions like this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PETER BUSCEMI
Counsel of Record
THOMAS K. WOTRING
JOSEPH E. SANTUCCI, JR.
MITCHELL J. MATORIN
MORGAN, LEWIS & BOCKIUS LLP
1800 M Street, N.W.
Washington, DC 20036
(202) 467-7190
Counsel for Petitioner

March 9, 1999